



REPUBLIC OF KENYA

High Court at Machakos

Civil Suit 122 of 1999

No. 3323

PHYLLIS N. MBALUTO.....PLAINTIFF
VERSUS

KENYA POWER AND LIGHTNING CO.LIMITED.....DEFENDANT

JUDGMENT

By a plaint dated 22nd February, 1999 and amended with leave of court on 17th July, 2003, the plaintiff pleaded that she was the owner of all that piece or parcel of land known as Mumbuni/Kasinga/2715 hereinafter “*the Suit premises.*” She had purchased it in 1992 or thereabouts from one, **Isaac Ndolo**, deceased for purposes of putting up commercial premises. However, between 1995 and 1996, the defendant, without her consent, knowledge and without paying her any compensation, erected an electricity pole and power supply cables, thereby making it difficult for her to develop the suit premises as intended. She therefore, prayed for general damages/mesne profits for loss of user, the defendant do at its own costs relocate the electricity pole and the electric power supply cables from the suit premises, permanent injunction restraining the defendant from maintaining the electricity pole and electricity power supply cables, costs of the suit and interest.

The defendant filed its defence dated 16th April, 1999 which was subsequently amended and filed in court on 13th August, 2003. The case for the defendant was that it denied that the plaintiff was the owner of the suit premises. The defendant further denied that it erected a pole or electric supply cables on the suit premises or any property belonging to the plaintiff as alleged or at all or that any electric pole or power supply cables are on or passed over any land belonging to the plaintiff. It was defendant’s position that it obtained way leave consent to erect electric poles and electrical power supply cables over the land belonging to **Isaac Ndolo**. The plaintiff thereafter filed a reply and the pleadings were closed.

The case was initially heard partly by **Mwera, J** who subsequently left the station on transfer having heard 4 witnesses. However, in his ruling of 29th May, 2003 on the plaintiff’s application for leave to amend the plaint, **Mwera, J** directed that the case commences de novo to allow for consistency. The case had been filed initially in the High Court of Kenya at Nairobi and subsequently transferred to this court.

The hearing of the case thereafter commenced before **Sitati, J** on 31st October, 2007 with the plaintiff testifying as PW1. She stated that the suit premises belonged to her. She had purchased the same from **Isaac Ndolo**, deceased on 20th June, 1992. At the time the suit premises were part of Mumbuni/Kasinga/367. She paid Kshs 44,000/= for the suit premises pursuant to a sale agreement with the deceased. The suit premises was a subdivision of the above parcel of land. The suit premises fell

within Machakos Municipal Council. The Council duly consented to the transfer. When she bought the suit premises, she intended to use it for commercial purposes. She intended to put up 3 shops on it. Towards that end, she obtained from Machakos Municipal Council, its approval of her building plans. Upon obtaining the approval, she started construction work in the year 1997. It was then that she found out an electricity pole had been erected on the plot as well as electricity cables. As a result she could not continue with the construction. When she commenced the construction the pole had not been erected. It was erected thereafter. She was informed by the Machakos Municipal Council employees that she could not roof the building because of the overhead electricity wires. She approached the defendant and asked it to re-route the power line. The defendant declined on the basis that it had obtained consent to erect the pole and cables from the owner of the land, the deceased. Because of her inability to complete the construction she had commenced, she incurred losses. The building materials wasted away. She had not made use of the plot over the years. For these reasons she prayed to court for an order that the defendant do pay her for loss of user, re-route the pole and cable, permanent injunction, costs and interest.

Cross-examined by **Mr. Wambua**, learned counsel for the defendant, she conceded that the suit premises had not been transferred into her name because the deceased passed on just a year from the date of purchase. She had also not obtained consent to the transaction from her relevant Land Control Board. She was still pursuing the deceased's family for the transfer. She was not aware that **Lawrence Kioko**, a son of the deceased had given consent to the defendant to erect on the suit premises the pole and cables. She conceded as well that she could not commence construction without construction inspection card from the Municipal Council of Machakos. She had obtained such a card though. She was also aware of Civil Suit No.222 of 1998 in which her husband had sued the defendant over the same issue. She however hastened to add that the suit had since been withdrawn. Otherwise, the power line and cables were erected on the suit premises after she had commenced the construction. Shown a letter dated 29th September, 1997 by the defendant, she admitted that the letter talked of the defendant having obtained way leave from **Kioko**. She could not remember if the defendant had demanded of her to meet costs of re-routing. And even if such demand was made, she would not comply because she had not allowed them to erect the pole and cables. Finally, she conceded that though her building materials were wasted, she had no evidence to back up that claim.

Joyce Wavinya Isaac (PW2) is the wife of the deceased. She confirmed that her deceased husband sold the suit premises to the plaintiff. She confirmed though that the plaintiff had yet to obtain title to the suit premises. She had applied for a grant of letters of Administration vide Succession Cause Number 365 of 2005. **Lawrence Kioko** was her son. He had no authority however to grant way leave to the defendant. She had not on her part given such consent. After buying the suit premises, the plaintiff commenced construction but could not finish due to the presence of the power line which was next to the construction site.

Cross-examined, she conceded that the plaintiff was not among those listed in the petition for the grant of letters administration intestate as having an interest in the estate of the deceased. She stated however, that the omission was an error. She was aware that **Lawrence Kioko** had signed a form with the defendant in April 1995 as he had informed her. She did not however agree or approve such signing. She had however not complained to the defendant regarding what **Lawrence Kioko** did, nor did she stop the defendant from erecting the power line which was around 1996.

Lawrence Kioko (PW3) the son of both the deceased and PW2 also confirmed that the plaintiff bought from the deceased the suit premises. Representatives of the defendant had approached him seeking his consent for the way leave. Though he told them that he had no authority to sign the forms, they still insisted and he did so. This was in 1996. He had not sought his mother's authority and or consent, nor did he let any other member of the family know. He also did not have a grant of letters of administration.

Cross-examined, he stated that the form he signed was dated 8th April, 1995. It was with regard to plot 367 which belonged to the deceased. The defendant's representatives had come to him accompanied with one, **Patrick Nduva Munyao** who wanted electricity connected to his plot. He told him to sign the form. He did so and **Nduva** got power. He could not tell whether the plaintiff had commenced construction by the time he signed the form. However, he was certain that there was no building on the

path of the power lines.

When the case next came up for hearing on 7th May, 2012 **Sitati, J** had left the station on transfer. The task of moving the case forward therefore fell on me. Parties agreed that the case proceeds from where **Sitati, J** had left.

Harun Manundu Kimoni (PW4) was the Land Adjudication Officer. He testified that the suit premises was a sub-division of the original lands parcel Iveti/Mungala/367 amongst others. After the sub-division, the original number 367 was retained by the original owner, **Isaac Ndolo**. Initially Iveti Location was large and due to administrative changes, it was sub-divided into 2 locations, Mumbuni and Iveti. Also the sub-locations changed. The initial sub-location, Mungala was subdivided into Mungala and Kasinga. This led to changes in the land titles such that the original land parcel changed from Iveti/Mungala/367 to Mumbuni/Kasinga/367. These changes also affected all the resultant sub-divisions. The title to the suit premises was in the name of the plaintiff.

The last witness called by the plaintiff was **James Musyimi** (PW5). He is the works officer, town Planning Section of the Municipal Council of Machakos. He confirmed that back in 1997, the council had received a development application from the plaintiff and her husband with regard to the suit premises. The plan was approved and construction began the same year. He inspected the construction as expected up to ring beam level. Thereafter there was no further development for the reason that there were power lines passing through the suit premises. The council's approval had been given subject to re-routing of those power lines by the plaintiff. This had not been done and as far as he was concerned unless the power lines were re-routed there could be no further construction on the site.

Cross-examined, he admitted that the power lines existed before the plan was presented for approval. The approval was strictly subject to re-routing of the power lines. The construction would still have started subject to the re-routing later. The re-routing should have been initiated by the plaintiff. He did not know whether she had done so.

The defendant in response to the plaintiff's case called only one witness, **John Muriuki**. He is the way leaves officer with the defendant. Way leaves are rights of way for the defendant to use land owned by a 3rd party in order to erect power lines. He had a copy of a way leave in respect of the original plot, Mumbuni/Kasinga/367, the owner being **Isaac Ndolo**. The way leave agreement was signed by **Mr. Lawrence Kioko**, a son to **Isaac Ndolo**. Though **Isaac Ndolo** had passed on at the time, still **Lawrence Kioko** had authority to execute the agreement as he was the one using the suit premises following the death of his father. By the time of the way leave agreement, the suit premises had not been excised from the original title. The defendant later received a letter from **Benard M. Mukeku** requesting for the re-routing of the power lines. He did not quote any plot number. Nonetheless the request was accepted subject to payment of Kshs19,600/= for the exercise. There was no response. If payments had been made and consent for re-routing obtained, the defendant would have re-routed the power line. That way, the plaintiff would have mitigated her loss. Indeed she was the sole cause of her loss. Otherwise the defendant prayed for the dismissal of the Suit.

Cross-examined by **Ms Nganga**, learned counsel for the plaintiff, he stated that though **Lawrence Kioko** did not have a grant of letters of Administration, he was nonetheless the person using the suit premises. He had exercised due diligence by meeting several family members of the deceased and they all identified **Lawrence Kioko** as their leader. The defendant received a letter from **Mr. Mukeku** and gave an undertaking to move the power lines subject to payment of fees. That was its normal practice.

Following the closure of the defendant's case parties agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered them alongside cited authorities.

The issues for determination in this case have succinctly been set out by the plaintiff in her written submissions. I will wholly adopt them for purposes of this judgment. The 6 issues framed by the plaintiff are;—

§ Whether the plaintiff was the owner of the suit premises.

§ Whether the suit premises was a subdivision from Mumbuni/Kasinga/367.

§ What use was the plaintiff to put the suit premises to and whether she had obtained the relevant approvals.

§ Whether the defendant had obtained way leave consent over the suit premises.

§ Whether the plaintiff suffered loss.

§ Whether the plaintiff is entitled to the prayers sought.

Dealing with the 1st issue, it is the plaintiff's case that indeed she is the owner of the suit premises having purchased it from **Isaac Ndolo**, deceased. She tendered in evidence a sale agreement written in Kikamba language and an English translation thereof evidencing that indeed she had purchased the suit premises. The widow of the deceased (PW2) and her son (PW3) all confirmed that the plaintiff bought the suit premises from the deceased. Finally, there was the evidence of the Land Adjudication Officer. He produced a title deed evidencing that the suit premises were registered in the name of the plaintiff. From all the foregoing, the defendant's assertion that the plaintiff was not the owner of the suit premises ought to fail.

The defendant has countered the foregoing by asserting that the plaintiff had not established that she was the owner of the suit premises at the material time. That the title deed was issued to the plaintiff on 3rd April, 2009, more than 12 years after the way leaves consent had been obtained. That the plaintiff produced proof of ownership of the suit premises when the way leave agreement was entered into, and the only evidence produced by the Land Adjudication Officer is a title deed issued in 2009. It is the defendant's submissions therefore that the plaintiff was not the registered owner of the suit premises at the time it obtained a way leaves consent. The certificate of official search shows that the registered proprietor of the suit premises at the time was the deceased and not plaintiff. The said registration was effective in 1997 while the plaintiff alleges to have purchased the suit premises in 1992.

On the basis of the documents presented in court, I have no doubt at all that the plaintiff is the registered proprietor of the suit premises. There is a title deed in respect of the suit premises dated 3rd April, 2009 in the name of the plaintiff. That alone settles the issue of ownership of the suit premises. However, much as the plaintiff claims to have purchased the suit premises in 1992 in law she only became the proprietor of the suit premises after she was issued with the title deed on 3rd April, 2009. Prior to that, the suit premises was still the property of the deceased. No wonder the certificate of official search dated 15th March, 2000 showed that the deceased was still the registered proprietor of the suit premises. Further in the petition for the grant of letters of Administration intestate filed by the deceased's wife, the suit premises are shown as part of the deceased's assets. However, the plaintiff's name has been left as a beneficiary of the estate of the deceased. To the deceased's wife, this was an error that could be corrected in future.

This suit is concerned with or touches on the events that occurred prior to the plaintiff being issued with the title deed with regard to the suit premises. Accordingly between 1992 and 3rd April, 2009 when the plaintiff was registered as the proprietor of the suit premises, she was not the owner of the suit premises. She only became so after being issued with the title deed on 3rd April, 2009.

With regard to the 2nd issue, there is no doubt at all that the suit premises were a subdivision of Mumbuni/Kasinga/367. The Land Adjudication Officer gave evidence to the effect that the aforesaid parcel of land was subdivided after an objection was lodged in the lands office on 13th March, 1990 by the deceased. He produced a certificate of title showing that after the sub-division titles were issued to respective owners of the parcels of lands arising out of the sub-divisions, one of them being the plaintiff.

The response of the defendant is to the effect that the sub-division was done long after it had obtained way leave consent and erected the electricity supply cables and poles. In other words, at the time the way leave was obtained, the plaintiff was not known to the defendant and there were no buildings on the suit premises.

From the defendant's response, it is quite apparent that it concedes that indeed there was a sub-division of the original Mumbuni/Kasinga/367 and that the suit premises were as a result of such sub-division. Accordingly, the answer to the 2nd issue framed is that, yes, the suit premises was a sub-division of Mumbuni/Kasinga/367.

With regard to the 3rd issue, the plaintiff testified that she intended to put up a commercial building on the suit premises. She produced approved building plans from the Municipal Council of Machakos. There was evidence that she had commenced on the construction and had in fact reached the ring beam level before she was stopped by PW5 who had all along inspected the construction. A record to that effect was tendered in evidence by the said witness.

The defendant countered the foregoing by stating that the plaintiff failed to obtain a construction inspection card and as such, the approval of the building plan became void. No evidence was adduced of the intended user and or any alleged construction undertaken by the plaintiff.

My take is that on the evidence available, the plaintiff has demonstrated that she intended to put up a commercial building consisting of 3 shops. This evidence was not seriously challenged by the defendant nor was it rebutted. Contrary to the assertion by the defendant that she did not obtain a construction inspection card, the opposite is in fact true if the evidence of the Works Officer is to be believed. Indeed it was this witness who stopped further construction by the plaintiff once she had reached ring beam level citing the power lines as the reason.

Coming to the fourth issue, it is the plaintiff's case that the act of the defendant erecting electricity pole and electric cable over the suit premises was without her consent and was therefore irregular and unlawful. That being the case, the plaintiff was not obligated to re-route them at her cost as demanded of her by the defendant. The demand was therefore unjustified and ought to fail. The consent given by **Lawrence Kioko** was of no legal effect as he had not sought and obtained a grant of letters of Administration over the estate.

The retort by the defendant is that it obtained valid way leave consent over Mumbuni/Kasinga/367, which was later subdivided. The subdivision was long after it had erected the electric pole and cables. The consent given by the son of the deceased was valid as there were no letters of administration in respect to the estate of the deceased, and the said son was the one using the suit premises when the consent was obtained in 1995. In any event the certificate of official search did not indicate the plaintiff as the owner of the land. The mother or the son of the deceased did not produce and or take out any letters of administration of the deceased's estate.

It is of course trite law that any dealing over the estate of a deceased person, can only be by a person holding letters of administration over the estate. However, this was not the case here. The defendant's way leaves officer, however testified and added another dimension to the aforesaid position in law. It was his testimony that in cases where the owner of the plot is deceased the defendant's way leaves officers look for the person with letters of administration or in the absence of such a person, the person in occupation and or possession and use of the land. From the records at the lands office, the defendants established that the owner of Mumbuni/Kasinga/367 was **Isaac Ndolo**, deceased. The way leave consent was therefore executed by the deceased's son who was then in possession and actual use of Mumbuni/Kasinga/367 which appears to have been sub-divided later.

The evidence of the defendant on the issue of the deceased's son executing the consent without a grant of letters of administration but as a person in actual possession of the suit premises was not seriously challenged by the plaintiff. I am therefore prepared to accept the evidence of the defendant that if it is seeking way leave consent with regard to the estate of the deceased they will first approach the person

with a grant failing which they will look for a person in actual use and possession of the land in which the way leave is sought. This makes practical sense, since what is sought is not a transaction inimical to the title of the owner of the land but a mere consent for a way leave. This was a mere right of way to enable the defendant erect power line. The circumstances of this case indeed justify the above observation. Here none of those who were required to take out letters of Administration had done so and they were not about to do so in the near future. Yet there was **Patrick Nduva Munyao** who wanted power. That could only be done if the power line went through the suit premises. If the said **Nduva** and or the defendant were to insist on dealing with persons in possession of a grant and forgetting the people in actual possession of such parcels of land, it could result in tremendous losses and suffering. In the premises I do agree with the defendants submissions that, **Lawrence Kioko** gave them consent “*since he was the one using the land*”. The defendant’s evidence on that aspect of the matter was not at all challenged.

It is quite clear from the evidence that the consent was executed on 8th April, 1995. This was long before the plaintiff acquired title to the suit premises. She cannot therefore, be heard to complain that the deceased’s son had no capacity to give the consent. The deceased’s son conceded that the defendant’s representatives accompanied by one, **Nduva** brought some papers for him to sign which he did. In fact he seems to suggest that it was **Nduva** who prevailed upon him to sign the papers. He also did not dispute the fact that after his father’s death, he remained in occupation of the suit premises. Indeed when the defendant’s officers visited the area they found him on the land. At the hearing however, he claimed, for the first time, that he did not understand the papers from the defendant’s officers which he signed. To my mind, this disclaimer was an afterthought. In his own evidence he stated that it took him 2 weeks after signing the consent to inform his mother what he had done. The mother admonished him and told him that he should not have consented. Could the mother have admonished him without knowing the consequences of the consent? I do not think so. The mother in her evidence categorically stated “**Lawrence Kioko** had no authority to grant my way leave Kenya Power.” So, there it is. She knew that her son had granted way leave to the defendant. How could she have known without being told by her son? Obviously, her son is not a witness of truth. He is therefore, not a credible witness. In the premises and in any event the plaintiff is estopped from disclaiming the representation given to the defendant, which led to the way leave agreement. The son’s signature was in fact duly witnessed and in signing the agreement, he undertook that the consent was irrevocable. In my view therefore, the defendant duly obtained way leave consent over the suit premises.

Has the plaintiff suffered loss as a result? The plaintiff gave evidence that she intended to construct a commercial building on the suit premises. Indeed construction commenced and was stopped at the ring beam level due to electricity pole and electric cables irregularly erected on the suit premises. The plaintiff’s demand that the defendant re-routes the pole and cables had not been heeded, but insists that the plaintiff should meet the costs of re-routing. In answer the defendant takes the view that that having acquired title to the property in 2009, the plaintiff can only seek re-routing of the electric cables and poles at her cost.

The evidence on record suggests that at the time the post and cables were erected on the suit premises, the plaintiff had not commenced construction. According to the plaintiff, she hatched the construction plans in 1997. She testified thus:-

“After getting the letter of approval of the plans, I started the construction work in the year 1997. After I started the construction I found out that electricity pole had been erected on the plot. There were also electricity cables erected on the plot. As a result I could not continue with the construction...”

Under cross- examination she maintained-

“The power line and cables came on to my plot as I was in the process of construction. Yes the power line came after I had started the construction...”

This assertion cannot possibly be true since earlier on 5th November, 1996, the plaintiff’s husband, **B.M Mukeku** had written to the defendant complaining about the erection of the power line on the suit premises and seeking its relocation.

On his part, the deceased's son testified that, he gave his consent in 1996. However the consent itself shows that it was executed on 8th April, 1995. I will therefore take it, that consent was obtained in 1995. Cross-examined on the issue he stated thus;-

“By the time I signed the form I can't remember whether Phyllis has started construction but what I know is that there was no building on the path of the power lines...”

As for the Works Officer, he testified that back in 1997, the council received a development plan application from the plaintiff and her husband. The plan was approved and construction commenced same year. Indeed from the inspection card tendered in evidence the foundation was inspected on 30th October, 1997. He also testified that the approval of the plans was given subject to re-routing of the power lines by the plaintiff. This evidence suggests that the power lines were installed before the commencement of the construction contrary to the evidence of the plaintiff. Indeed under cross-examination, he maintained that-

“The power lines existed before the plan was presented for approval. The approval was strictly subject to re-routing of the power lines”

Finally, the evidence of ways leaves officer, also confirms that by the time the power line was installed, the plaintiff had not commenced any construction on the suit premises. Indeed by the time the agreement was executed, the suit premises had not been excised from the original title.

The totality of all the foregoing is that by the time the plaintiff commenced her construction, the power line was already in place. For her to have testified to the contrary, means that she was being economic with the truth. Her testimony cannot therefore be believed.

Indeed had there been buildings on the suit premises, the defendant no doubt would have ensured that the power line did not run over buildings and would have taken steps to re-route it elsewhere if there were buildings along the intended path. The fact that the plaintiff and her husband applied for approval of building plans in 1997, 2 years after the way leaves consent and after the defendant had erected the power line is proof that the suit premises were vacant as at the time power-line was installed.

Further, I am certain that the plaintiff was aware of the existence of the power line when she commenced the construction. She had asked for the same to be re-routed. She was advised to meet the costs of re-routing. She refused to comply and went ahead to commence construction. Had she complied, she would have mitigated her loss and perhaps this suit would not have been necessary. The plaintiff having elected to commence the construction in the knowledge that there existed a power line and against the condition imposed on the approval of her development plan, that it was subject to re-routing of the power line, she has only herself to blame for any loss she may have incurred as a result. The defendant was ready and willing to re-route the power line as long as the plaintiff paid for the same. She refused to do so. Answering issue number 5 as framed therefore, I am satisfied that the loss suffered if at all cannot be apportioned to the defendant.

The last issue framed is that whether the plaintiff is entitled to the prayers sought in the plaint. My answer is pretty obvious arising from what I have so far said. The plaintiff brought the loss to herself. She is not entitled to any of the prayers sought in the plaint. The plaintiff claimed general and or mesne profits for loss of user of the suit premises. Much as I am bound to dismiss the plaintiff's suit Practice demands that I should indicate how much I would have awarded the plaintiff had I found in her favour.: The plaintiff has claimed Kshs.2,000,000/= on this account. The plaintiff merely plucked this figure from the air without any factual or evidential basis.

Loss of user cannot be general damages. It is special damage. As we all know, special damages should not only be explicitly pleaded but must also specifically be proved. As stated in the case of **Banque Indo Suez V DJ Lowe and Company Limited [200] eKLR** by the Court of Appeal;-

“...though special damages were specifically pleaded or claimed they were not proved at all. It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the

court and expect them to be awarded. It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained and may not be inferred from the act. The degree and certainty and particularity of proof required depend on the circumstances and nature of the acts themselves ...”

In this case, the plaintiff neither pleaded with the specificity required the loss of user nor did she particularly prove the same. For the above reasons I would still have dismissed the claim for damages.

In the upshot, I find that the plaintiff has not proved her case against the defendant to the required standard. The claim therefore fails and is accordingly dismissed with costs to the defendant.

RULING DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day SEPTEMBER, 2012.

ASIKE –MAKHANDIA

JUDGE